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IN THE

Supreme Court of the United States.

No. 532. OCTOBER TERM, 1947.

IRWIN KOTT, ISRAEL NEEDLEMAN AND HARRY WEINER,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

Your petitioners, IRWIN KOTT, ISRAEL NEEDLEMAN and HARRY WEINER respectfully represent as follows:

1. On January 17, 1948 their petition for certiorari to the Fifth Circuit Court of Appeals which affirmed their convictions for violation of the Emergency Price Control Act (56 Stat. 33 as amended), and conspiracy to violate it (35 Stat. 1096), was filed. On February 16, 1948 certiorari was denied by this Honorable Court.

2. After the petition for certiorari was filed this Honorable Court decided *United States v. Johnson* (decided February 2, 1948) and granted rehearing and certiorari in *Lustig v. United States* (#1389, October Term, 1946).

3. Upon reconsideration of the opinion of the court below,[1] in the light of *United States v. Johnson, supra; United States v. Di Re* (decided January 5, 1948) and the action of your Honarable Court in granting certiorari in *Lustig v. United States, supra;* and *Trupiano v. United States* (#427, October Term, 1947; cert. granted December 15, 1947), petitioners urge that there exists an important question requiring review by this Honorable Court: whether damaging evidence, part and parcel of the founda-

[1] The Court's opinion is somewhat confusing in that, simultaneously, it dismissed as interlocutory petitioners' appeal from the denial of their Motion to Suppress evidence obtained by means challenged as an illegal search and seizure (R. 1320), and passed thereon, holding the arrest, search and seizure legal (R. 1321; 1326).

tion of petitioners' convictions, was inadmissible and ought to have been suppressed because it was obtained through and by means of an unconstitutional search and seizure.

4. While riding in an auto driven by an informer acting in cooperation with federal agents, in accordance with prearranged plan, your petitioner Kott was arrested without a warrant in Louisiana by investigators of the Alcohol Tax Unit. He was not informed by the arresting officers of the cause of his arrest (R. 172, 635, 636). The federal agents searched him and seized from his person $7,120.00 in marked currency (R. 636). Petitioners' Motion to Suppress the evidence thereby obtained was denied (R. 1320).

5. Said search of petitioner Kott and seizure of the $7,120.00 was in violation of the provisions of the United States Constitution, Fourth Amendment, in that the arrest without warrant was invalid because the arresting officer failed to comply with the provisions of the state law governing the arrest (*United States v. Di Re, supra; United States v. Johnson, supra*). Article 70 of the Code of Criminal Law and Procedure of the State of Louisiana, applicable to the arrest, provides as follows:

> "70. Arrest without warrant—Duties of officer—Prima facie evidence of performance.—When arresting a person, without a warrant, *the officer making the arrest shall inform the person arrested of his authority and the cause of the arrest,* except when the person arrested is engaged in the commission of a criminal offense, or if he flees or if he forcibly resists arrest before the officer has time to inform him. The return of the officer making the arrest, indorsed upon the warrant upon which the accused person shall be subsequently held, affirming compliance with the provisions herein, shall be prima facie evidence of the fact in the trial of any criminal cause." (Emphasis added.)

There is no evidence in the record that the officer or officers making the arrest informed petitioner Kott of the cause

of the arrest (R. 172; 635, 636). Petitioners' Motion to Suppress gave the Government clear notice (unlike in the *Di Re* case) that petitioners challenged the validity of the arrest. And, since the Government failed to prove that petitioner Kott was informed of the cause of the arrest,[2] it must be concluded, as a matter of law, that the arresting officer did not "inform the person arrested of . . . the cause of the arrest." Consequently, the arrest was illegal under Louisiana law and the search and seizure invalid under federal law.[3] Petitioners' convictions should, therefore, be reversed.[4]

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[2] Investigator Barlow, an arresting officer, in his direct examination, gives a detailed description of the acts which occurred and the statements made during the arrest and the subsequent taking of Kott to the Tallulah, Louisiana police station (R. 635, 636). In his cross-examination, he again describes the arrest (R. 638). Nowhere does he say that he informed Kott of the cause of the arrest.

[3] The Circuit Court of Appeals justified the arrest upon the ground that through John's "cooperation" with Pace, a federal agent, Pace (not the arresting officer) "had been kept fully conversant with the progress of the matter by John" (R. 1326). Assuming such facts, the failure of the arresting officer to have obtained the necessary warrants beforehand becomes inexcusable.

[4] While this petition, in compliance with Rule 33 of this Honorable Court, is restricted to the grounds above specified, your petitioners respectfully submit that the denial of their petition for certiorari sanctioned the admission of damaging hearsay statements of John, an informer, erroneously thought by both lower courts to be a co-conspirator of petitioners, though in fact (as said by the Circuit Court of Appeals) at all times he "was acting in cooperation with Pace and the federal agents" (R. 1326) and of one Hillman, said by the lower court to have been a co-conspirator of John (R. 1325). The effect of the court's denial of the certiorari is thus to sanction a practice in direct conflict with the decision of *Fiswick v. United States*, 329 U. S. 211 and the reasoning of *Blumenthal v. United States*, 92 L. ed. 183, 190, 191. Similarly, the denial of certiorari sanctioned, under the guise of an "erroneous exercise" of discretion

WHEREFORE your petitioners respectfully pray that rehearing be granted, that the order filed February 16, 1948, denying certiorari be vacated, and that certiorari be granted.

And your petitioners will ever pray, etc.

Respectfully submitted,

DAVID BERGER,
JOHN W. BOHLEN,
THOMAS D. MCBRIDE,
Counsel for Petitioners, Israel Needleman and Harry Weiner.

LOUIS HALLE,
Counsel for Petitioner, Irwin Kott.

We hereby certify that this Petition is presented in good faith and not for delay and that it is restricted to substantial grounds available to petitioners although not previously presented.

DAVID BERGER,
JOHN W. BOHLEN,
THOMAS D. MCBRIDE,
Counsel for Petitioners, Israel Needleman and Harry Weiner.

LOUIS HALLE,
Counsel for Petitioner, Irwin Kott.

(R. 1323) a palpable violation of Rule 21 (b) as well as a prejudicially harmful misapplication of Rule 17 (c) of the Rules of Criminal Procedure. Therefore, it is respectfully urged that if this petition be granted, certiorari be made broad enough to permit review of these rulings as well, though such errors are not relied upon herein as grounds for rehearing.